Editor's note: Appealed; dismissed, Civ.No. A89-101 (D.Alaska 1989)

BETHEL NATIVE CORP.
PUBLIC HEALTH SERVICE

IBLA 85-714 Decided March 16, 1988

Appeals from a decision by the Alaska State Office, Bureau of Land Management, approving conveyance of a portion of lands selected under Native village selection application F-14838-A and F-14838-A2, rejecting the applications in part, and reserving easements.

Affirmed.

1. Alaska Native Claims Settlement Act: Definitions: Public Lands -- Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations

   "Public lands" available for selection by a Native village corporation under the Alaska Native Claims Settlement Act do not include the smallest practicable tract of land actually used by a Federal agency in connection with the administration of an installation or facility. 43 U.S.C. § 1602(e) (1982). Although it is not necessary that the land had been improved on Dec. 18, 1971, the excepted land must be in actual use on that date and throughout the selection period. Land which is the subject of planning or which is held for future use is available for selection.

2. Alaska Native Claims Settlement Act: Definitions: Federal Installation -- Alaska Native Claims Settlement Act: Definitions: Public Lands

   Land actually used in connection with the administration of a Federal installation during the period of time that the land was available for selection by the Native village corporation may properly be excluded from an interim conveyance to a Native village corporation under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982).

APPEARANCES: Evelyn C. McChesney, Esq., Regional Counsel, Seattle, Washington, and Duke McCloud, Esq., Office of the General Counsel, Rockville, Maryland, for the U.S. Department of Health and Human Services' Public Health Service; David D. Clark, Esq., Anchorage, Alaska, for the Bethel Native Corporation; Keith A. Goltz, Esq., Office of the Regional Solicitor, Alaska Region, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Public Health Service of the United States Department of Health and Human Services (PHS) and the Bethel Native Corporation (BNC) have appealed separately from a May 16, 1985, decision of the Alaska State Office, Bureau of Land Management (BLM), approving conveyance of certain lands within U.S. Survey 4000 pursuant to Alaska Native village selection application F-14838-A and F-14838-A2. 1/ The decision also rejected the applications in part and reserved easements on U.S. Survey No. 4000.

The land in question was withdrawn from entry pursuant to a Secretarial Order on April 7, 1939. The Indian Health Service (IHS) began operating a hospital on the land in 1955. 2/ In 1969, IHS initiated plans to construct a new hospital within U.S. Survey No. 4000. Congress appropriated $ 300,000 for the initial planning and soil tests in 1971, and the new Bethel hospital was completed and in operation in September 1980.

Section 11(a)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(a) (1982), withdrew "public lands" in townships enclosing certain identified Native villages and certain townships contiguous or proximate thereto from appropriation under the public land laws on December 18, 1971. These "public lands" were made available for selection by the Native corporations under section 12(a) of ANCSA, as amended, 43 U.S.C. § 1611(a) (1982). BNC filed selection applications F-14838-A on November 22, 1974, and F-14838-A2 on December 18, 1975, for the surface estate of lands in the vicinity of Bethel, Alaska, pursuant to section 12 of ANCSA, 43 U.S.C. § 1611 (1982). These applications included lands in U.S. Survey No. 4000.

Under section 3(e) of ANCSA, 43 U.S.C. § 1602(3) (1982), "public lands" available for ANCSA selection include "all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation * * *." (Emphasis added.) Thus, the issues raised by the cross-appeals of BNC and PHS is whether lands in U.S. Survey No. 4000 are eligible for selection, or ineligible because of actual use of the land in connection with a Federal installation.

To establish procedures governing determinations under section 3(e) of ANCSA, the Department promulgated 43 CFR Subpart 2655, effective November 21, 1980. These regulations set forth the process for determining what lands were in actual use in connection with the administration of a Federal installation at the time of enactment of ANCSA and thus excepted from a conveyance to Native corporations. See 45 FR 70204 (Oct. 22, 1980).

1/ U.S. Survey No. 4000 is located in secs. 8 and 17, T. 8 N., R. 71 W., Seward Meridian, and contains 143.24 acres.

2/ The Indian Health Service is a component of the Public Health Service within the Department of Health and Human Services.

In a notice issued by BLM on April 21, 1982, PHS was directed to supply the relevant information necessary for a section 3(e) determination for those PHS lands in U.S. Survey No. 4000. This review was serialized as section 3(e) case file AA-18959. On September 27, 1982, PHS responded by submitting a written report which contained a metes and bounds description of the tract claimed to be excepted from selection and a detailed description of the land use divided into four areas. Area 1 was described as all of U.S. Survey 4000 north of the highway, the site of the new health facility. Area 2 was the central portion of the survey, the site of the old Bethel hospital. Area 3, the southeastern portion of the survey along the Kuskokwim River, included the old airstrip which was being used as a storage yard and warehouse. The last, Area 4, was the southwestern portion of the survey used as a tank farm for fuel storage. In its submittal PHS stated that the land in Area 1 had been continuously used throughout the December 18, 1971, through December 18, 1974, selection period. For Area 1 PHS stated that the use consisted of "early construction process use," in the form of soil testing and boring, site inspection, and tramping of the area by engineers. PHS also claimed the smallest practicable tract needed by the agency to continue operation of the PHS Alaska Native hospital would include all four areas described in its submittal. As an additional argument for retention, PHS noted that during the selection period the entire survey area was used by hospital employees for recreational activities.

On March 7, 1983, BNC submitted a detailed response to the PHS submittal, outlining the reasons for its conclusion that the majority of the lands sought by PHS were not exempt from selection pursuant to section 3(e) of ANCSA. The basis for BNC's position was that the majority of the lands had not been actually and continuously used during the selection period. For Area 1, BNC claimed that none of the lands were exempt because the lands were not being used by PHA on December 18, 1971, and that the use of the lands in the selection period ending December 18, 1974, was not continuous. For Area 2, BNC recognized use of a portion of the land on December 18, 1971, and throughout the selection period, but objected to the "borrow pit" area being included because there had been no extraction of material between 1970 and 1983. For Area 3, BNC argued that a portion of the area was suitable for an exclusionary finding because it had been substantially improved prior to December 18, 1971, and subsequently used by PHS for storage. However, BNC objected to the exemption of any unimproved portion of Area 3. For Area 4, BNC admitted that a portion of the tank farm area had been used by PHS, but argued that a portion of Area 4 which had been used by Chevron USA had not been used by PHS. BNC argued that the use of a portion of Area 4 by Chevron USA was not for the convenience of PHS, and thus that portion used by Chevron USA should not be exempt from selection.

After reviewing PHS' submittal and BNC's response, BLM made a preliminary determination on September 30, 1983. 3/ The preliminary determination

3/ BLM's preliminary findings were set out in a Sept. 30, 1983, memorandum to the Chief, Division of ANCSA Adjudication, from the Chief, Branch of Easement Identification, through the Deputy State Director for Conveyance Management.

document contains a detailed discussion of PHS' reasons for exclusion and the BNC response. It also contains a conclusion regarding each of the four areas discussed and a finding regarding the smallest practicable tract actually used by PHS on December 13, 1971.

For Area 1, the determination was that "PHS has not established a 'construction process usage' of Area 1 prior to December 18, 1971. Rather, on December 18, 1971, Area 1 was a land asset which PHS considered available to meet its 'reasonable and prudent future needs'" (Memorandum dated Sept. 30, 1983, at 9). It was determined that, in Area 2, the improved lands received extensive use throughout the selection period. Additional lands were found to be subject to the section 3(e) exclusion for use as a recreation area for the staff and a buffer zone. The borrow pit area was included in order to maintain a practical configuration of the retained tract. Most of the land within Area 3 was found to qualify for a section 3(e) exclusion, either because of actual use or to provide for a practical configuration of the retained tract. BLM found that Area 4, the tank farm, met the criteria for retention set forth in 43 CFR 2655.2(b)(3)(v), because of a need for a guaranteed availability of heating fuel for the hospital. The memorandum then described two tracts as being the smallest practicable tracts actually used by PHS, and as such not "public lands" under the provisions of ANCSA, and recommended rejection of BNC's application for two described tracts. The determination also recommended conveyance of other areas in U.S. Survey No. 4000 to BNC pursuant to selection application F-14838-A and F-14838-A2. The document also contained a metes and bounds description of that land.

A decision issued on May 16, 1985, approved conveyance of certain of the lands in U.S. Survey 4000 to BNC, rejected the applications as to other parts of the survey and reserved described easements. The preliminary conclusions set out in the September 30, 1983 memorandum appear to be virtually unchanged in the May 16 decision. 4/

We will review the appeals of PHS and BNC separately.

PHS Appeal

In its statement of reasons (SOR) on appeal, PHS asserts that BLM's interpretation of sections 3(e) and 12(a) of ANCSA would "freeze use of unimproved land by Federal agencies as of the beginning of the selection period (December 18, 1971)" (SOR at 20). PHS further asserts that: "Agencies constructing facilities on land which was unimproved on December 18, 1971 would do so at their own peril, despite congressional appropriations directing the construction, because BLM would relate back to December 18, 1971, to determine

4/ The BLM decision did however reject, in part, BNC's selection application F-14838-A2, which was filed pursuant to section 12(b) of ANCSA for certain lands previously selected pursuant to section 12(a) in application F-14838-A, as amended. Selection application F-14838-A2 was rejected as to the lands approved for conveyance pursuant to selection application F-14838-A.

'actual use'" (SOR at 20). PHS contends that the deletion of the word "improved" in the original proposal for ANCSA, from the adopted provisions of section 3(e), was a significant change indicative of a congressional intent to recognize the possibility of future improvements and "thus protect all Federal installations actually used at the time of the Secretary's determination" (Statement of Reasons at 22). Moreover, PHS argues that section 3(e) of ANCSA must be interpreted in light of the relevant IHS appropriation statutes, the Act of November 2, 1921, c. 115, 42 Stat. 208 (the Snyder Act), and the Indian Health Care Improvement Act, P.L. 94-437 (Sept. 30, 1976), 90 Stat. 1400, in order to determine the intent of Congress. PHS contends application of the appropriate statutory construction would lead to the conclusion that Congress thought section 3(e) would protect the new IHS hospital and housing when Congress appropriated the funds for construction of the facilities.

The basic issue in PHS' appeal is whether BLM incorrectly determined that the land underlying the new Bethel hospital is public land subject to selection by and conveyance to BNC. In its arguments on appeal, PHS contends that the following sequence of events must be considered as they have bearing on the proper interpretation of ANCSA.

(1) By 1967, the old Bethel hospital had deteriorated and was threatened by erosion of the river bank upon which it was built. The Deputy Director of the Alaska Area Native Health Service (AANHS) recommended construction of a new facility;

(2) by 1969, IHS headquarters had agreed with the area office of AANHS that it was not feasible to remodel the old hospital, and that replacement was necessary;

(3) in September 1969 a team of four engineers conducted a feasibility study to determine the cost of construction of a new facility. On February 20, 1970, the PHS feasibility study was completed;

(4) on April 15, 1971, a study commissioned by Yukon-Kuskokwim Health Corporation also recommended construction of a new hospital on the site recommended by the AANHS-PHS feasibility study;

(5) on April 21, 1971, testimony on the need for planning funds was presented to the Subcommittee of the Committee on Appropriations, House of Representatives, on Department of the Interior and Related Agencies Appropriations for 1972. As a result, Congress appropriated $ 300,000 for the initial planning and soil tests in 1971;

(6) in 1974, Congress ear-marked $ 600,000 for planning a new hospital facility, Bethel, Alaska in the FY 1974 IHS appropriations;

(7) in 1976, Congress appropriated $ 1,500,000 for the phased construction of a hospital at Bethel, Alaska,

(8) in 1977, 1978, and 1979, additional appropriations were made for the Bethel hospital totalling $ 36,467,000; and

(9) the new Bethel hospital was completed and operational in September 1980.

[1] The definition of "public lands" in both the Senate and House bills precedent to ANCSA clearly limited BLM's determination of a Federal agency's entitlement to improved lands actually used. 5/ The conference report deleted the word "improved" in the enacted version without a recorded explanation for this change. PHS argues that this deletion is significant and indicative of an intent by Congress to include preconstruction activities which directly involve the subject lands.

In Federal Aviation Administration, 83 IBLA 382 (1984), the Board addressed the issue now before us, and stated:

> [T]he real issue in this appeal is not whether the land in question was unimproved on December 18, 1971, but whether the land was in actual use. Indeed, BLM may approve retention of unimproved land provided it is actually used by a Federal agency on a continuing basis from December 18, 1971, until the date of Native selection. See 43 CFR 2655.2(b)(3) (e.g., buffer zones, storage lots, material sources). The definitions of the terms "actual" and "use" make it evident that planned use was not within the scope of the exclusion intended by Congress. "Actual" means "real" or "existing presently" as opposed to "conceivable," "possible," "constructive," or "speculative." See Black's Law Dictionary (Black's) 53 (4th ed. 1968); Webster's Third New International Dictionary (Webster's) 22 (1966 ed.). "Use" means the application or employment of something for some purpose. See Black's, supra at 1710. By comparison, "plan" is a proposed or tentative project, an intention. See Webster's, supra at 1729. If planning is included within the definition of actual use, the special definition in section 3(e) created by Congress is rendered meaningless. In Appeal of Paug-Vik Inc., 5 ANCAB 59, 87 I.D. 422 (1980), the Alaska Native Claims Appeal Board (ANCAB) [6/] construed the special definition in section 3(e) as follows:

5/ The pertinent portion of H.R. 10367 read: "'[P]ublic land' means all Federal land and interests therein situated in Alaska except (1) any improved land used in connection with the administration of any federal installation * * *." (Emphasis added.) See H.R. Rep. No. 523, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Ad. News 2192, 2221.

S. 35 provided the following definition:

"'[P]ublic lands' means all Federal lands and interests therein situated in Alaska as of the effective date of this Act, except: (1) the smallest practicable tract (but not less than forty acres), as determined by the Secretary, enclosing improved land actually used in connection with the administration of any Federal installation * * *." (Emphasis added.)
See S. Rep. No. 405, 92d Cong., 1st Sess. (1971).

6/ The Board of Land Appeals assumed the functions and responsibilities of ANCAB effective June 30, 1982. 43 FR 23690 (June 18, 1982).

> The definition in § 3(e) encompasses lands which are not subject to disposal under the general land laws, because they are reserved for government use. [Emphasis in original.] The expanded definition in § 3(e) makes reserved Federal land "public land" and therefore available for Native selection if not being actually used by a Federal agency. This broad definition in § 3(e) operates only to make land available for conveyance to Native corporations under ANCSA, it does not operate to make lands available for disposal under the general public land laws. [Emphasis added.]
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> Id. at 65, 87 I.D. at 425.

Federal Aviation Administration, supra at 388-389.

We are not persuaded by PHS' argument that section 3(e) of ANCSA and the Snyder and Indian Health Care Improvement Acts are sufficiently related in objective or purpose to justify interpreting the one in light of the others. See 2A C. Sands, Sutherland Statutory Construction, § 51.103 (4th ed. 1973). In Federal Aviation Administration, supra, where as here, the appellant argued construction of section 3(e) and an appropriations statute as in pari materia we stated:

> P.L. 92-398, 86 Stat. 580, is an Act "[m]aking appropriation for the Department of Transportation and related agencies for the fiscal year ending June 30, 1973, and for other purposes." Included in the many appropriations embraced in the Act is the "construction and furnishing of quarters and related accommodations for officers and employees of the Federal Aviation Administration stationed at remote localities where such accommodations are not available but at a total cost of construction not to exceed $ 50,000 per housing unit in Alaska." 86 Stat. at 583. The Act has no bearing on the settlement of the claims of Alaska Natives or the land used by a Federal agency as of December 18, 1971, to be excepted from Native selection. It is unreasonable to assert that Congress in passing a Department of Transportation appropriation bill including funding for construction of housing by FAA for its employees contemplated settlement of Native rights in the lands at issue under section 3(e) of ANCSA. We find that ANCSA and P.L. 92-398 involve neither the same subject matter nor the same purpose and, therefore, it is inappropriate to construe section 3(e) in light of P.L. 92-398.

Federal Aviation Administration, supra at 389-390. Likewise, we find it inappropriate to construe section 3(e) of ANCSA in light of the Snyder or the Indian Health Care Improvement Acts.

We find that BLM complied with the provisions and intent of Departmental regulations. The applicable regulations, 43 CFR Subpart 2655, include criteria for a determination of the smallest practicable site used in accordance with section 3(e). 43 CFR 2655.2, in particular, provides that BLM shall determine:

(a) Nature and time of use.

(1) If the holding agency used the lands for a purpose directly and necessarily connected with the Federal agency as of December 18, 1971; and

(2) If use was continuous, taking into account the type of use throughout the appropriate selection period.

The comments accompanying publication of the proposed and final versions of the rules at 43 CFR Subpart 2655 make it clear that the intent of the regulations is to require actual use which must have commenced on or before December 18, 1971. When public comments were solicited regarding the proposed rulemaking for Subpart 2655, BLM included the following invitation: "Public comments are specifically requested whether the use of the term 'actually used' in the definition should include land assets held by an agency as of December 18, 1971, to meet reasonable and prudent future needs in implementing its mission as established by law." 44 FR 54254 (Sept. 18, 1979). When final rulemaking was published, the following explanation appeared:

> [T]herefore the final rulemaking has been redrafted to reflect the three criteria which the Bureau of Land Management will use in order to make a 3(e) determination as to whether the lands are public lands and, thus, subject to conveyance to a Native corporation. These criteria, which were previously reflected but not expressly stated in the definitions section are: (1) Nature and time of use * * *
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> (1) Nature and time of use. This criterion derives from § 2655.0-5(a)(1) in the proposed rulemaking and sets out three provisions. The first is that the use must be for a purpose "directly and necessarily connected with a Federal agency as of December 18, 1971."
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> The second provision is that the activity must be continuous, depending on the type of use, throughout the appropriate selection period. Two aspects of this provision need to be addressed. The final rulemaking provides that use by the agency during the entire selection period is necessary in order for the lands to be exempt from Native selection. This provision represents a compromise [7/] between those comments which favored

7/ Although use of the term "compromise" may be a misnomer in this context, the commentary confirms the intent of the regulation to require use both as of Dec. 18, 1971, and thereafter throughout the selection period.

> establishing each agency's use solely on the basis of use on December 18, 1971, and those comments which expressed the view that use at any time during the appropriate selection period and, in some cases, proposed or future use should make the lands subject to retention by the agency. The provision that use should be continuous, considering the type of use, reflects this compromise.

45 FR 70204-05 (Oct. 22, 1980). It is clear that, after considering the Act and the comments submitted, BLM adopted language for Subpart 2655 which would provide the basis for a section 3(e) exclusion and that this exclusion would not be applicable to those lands which were not being used on December 18, 1971, even though there might be a planned use for the lands or a future need for the land. Moreover, it is explicit that the qualifying use must be continuous through the selection period. 8/

The structures of the new Bethel hospital were not built until 1980 and the land was otherwise not in use prior to that date. PHS urges the Board to expand its definition of "actual use" to include preconstruction planning and other activities which may not otherwise constitute use of the lands. The principal focus of any section 3(e) determination is whether that land under review was in actual use on December 18, 1971. After a review of the evidence, BLM found that as of December 18, 1971, PHS was not actually using that portion of U.S. Survey 4000 found suitable for conveyance. BLM properly determined, consistent with the statute and the regulations, that planning for a proposed Federal facility does not constitute an actual use of the lands. 9/

PHS has also submitted a request for oral argument on the substantive issue of its appeal, that is, whether the BLM's ANCSA 3(e) determination is correct. The issue has been ably briefed by the parties before the Board and it is doubtful that oral arguments could shed further light on the question. In light of the foregoing, PHS' request is denied.

BNC Appeal

In its appeal to the Board, BNC disputes that part of the May 16, 1985, BLM decision which found that a portion of Area 4 within U.S. Survey No. 4000,

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8/ We find that this is consistent with the Board's decision in Ukpeagvik Inupiat Corp., 81 IBLA 222 (1984). There the Board found that the regulations under section 3(e) of ANCSA "had the effect of limiting the Federal agency to use actually occurring within the appropriate selection period." 81 IBLA at 227. The statute and the regulations promulgated thereunder expressly require that a qualifying use be in existence as of Dec. 18, 1971, and continuously throughout the selection period.

9/ Notwithstanding the arguments advanced by the dissent, all of the activities prior to 1976 were in the form of a study of 1) whether a new hospital should be built, and 2) if one were to be built, was the site suitable. It was not until 1976 that there was any commitment to construct a hospital on the site. We admit that the failure to recognize the "cloud on the title" resulting from the Native selection was unfortunate. However, until 1976, there was no commitment to use the site.

used by Chevron U.S.A. as a fuel storage tank farm, had a direct, necessary, and substantial connection to the purposes of the Bethel PHS hospital facility. BNC contends that BLM incorrectly interpreted 43 CFR 2655.2(b)(3)(v), when finding a connection existed and determining that Area 4 was not public land subject to conveyance to BNC. In its original brief and subsequent pleadings BNC asserts that PHS could operate the new Bethel hospital without the Chevron fuel storage tanks.

[2] The applicable regulation, 43 CFR 2655.2(b)(3)(v), states:

> Tracts [not subject to selection under § 3(e)(1)] may include: * * * Lands used by a non-governmental entity or private person for a use that has a direct, necessary and substantial connection to the purpose of the holding agency but shall not include lands from which proceeds of the lease, permit, contract, or other means are used primarily to derive revenue.

Clearly, the intent of the regulation is to draw a distinction between those lands connected to an agency purpose (retention lands) and those lands used to derive revenue for an agency (selection lands). BNC does not dispute that Chevron pays no rental for the lands in Area 4, which leads to the conclusion that Chevron's use of the lands was directly related to PHS' need for a guaranteed source of heating fuel at the hospital, and it therefore provides a necessary and substantial connection to the purpose of the holding agency. The Board has previously stated that a Federal agency need only prove a logical nexus between use of the land and administration of a Federal facility, in order to establish entitlement to a section 3(e) exclusion. Ukpeagvik Inupiat Corp., 81 IBLA 222 (1984).

Based on our review of the record, we find BLM was correct when it found that the "smallest practicable tract" actually used by PHS included the tank farm in Area 4 used by Chevron, U.S.A.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office, BLM, is affirmed.

R. W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS CONCURRING IN PART AND DISSENTING IN PART:

I agree with the majority that the Bureau of Land Management (BLM) correctly applied Departmental regulation 43 CFR 2655.2(b)(3)(v) to determine that the Chevron tank farm located in Area 4 of the Bethel hospital reserve was properly retained in Federal use because it was in actual use for a Federal purpose: heating the public hospital at Bethel. The use to which the tract was put clearly brought it within the regulatory provision requiring retention of public lands in Federal ownership where there is a direct, necessary, and substantial connection to a recognized Federal purpose, in this case the furnishing of medical services.

I cannot agree with the majority disposition of Bethel Native Corporation's (BNC) selection of Area 1, however, since that tract encompasses the main hospital facilities which I believe were also in actual use for the Federal purpose which they now clearly serve at all times relevant to this appeal. I would therefore find that the tract of land upon which the hospital is located was actually used for a Federal purpose so as to preclude selection of the hospital site by BNC under provision of section 3(e) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1602(e) (1982). I recognize that to do so we must overrule a portion of our prior decision in Federal Aviation Administration (FAA), 83 IBLA 382 (1984), since that opinion restricted the meaning of the statutory requirement that lands be actually used for a Federal purpose so as to reject altogether the proposition that "planning" could amount to "actual use" of Federal lands. I would not so restrict the meaning of ANCSA section 3(e), but would allow consideration to be given to construction actually in progress on the date the act become law, to include consideration of the effect of construction planning upon the Federal use.

As the concurring opinion in FAA observed, there is no provision of the regulations published at 43 CFR Subpart 2655 that has direct application to the situation presented by this appeal; that is, nothing in 26 CFR Subpart 2655 deals with the situation where a Federal agency finds itself caught by the enactment of ANCSA in the middle of a project for expansion or rebuilding of its facilities which were located on a Federal reservation of public land in Alaska. FAA at 398. Although, when rules were proposed by the Department in 1979, it was initially contemplated that a regulation to deal with this aspect of conveyancing under ANCSA was needed, no final rule having direct application to the situation before us was ever published. The Supplementary Information supplied with the proposed rule pointed out that "[p]ublic comments are specifically requested on whether the use of the term "actually used" in the definition should include land assets held by an agency as of December 18, 1971, to meet reasonable and prudent future needs in implementing its mission as established by law." 44 FR 54254 (Sept. 18, 1979). The "definition" referred to by the proposer of such a rule was this:

> As used in this subpart, the term "the smallest practicable tract enclosing land actually used in connection with the administration of any Federal installation" means the least amount of public lands, improved or unimproved, actually used by a Federal agency

on December 18, 1971, and needed by the agency to continue to carry out its mission as established by statute.

(a) Lands actually used by a Federal agency include, but are not limited to:

(1) Lands necessarily used for prudent and reasonable action in support of a Federal agency program on December 18, 1971; * * *.

Id. at 54255. None of this language survived into the final rule.

Comments by the final rulemaking concerning the proposed regulations concerning this aspect of the proposed rulemaking is limited to the brief remark that, concerning the "definitions" section earlier proposed, "[t]his section received the largest number of comments, generally suggesting that the definitions were incomplete or unclear." 45 FR 70204 (Oct. 22, 1980). Since the final rulemaking shies away entirely from the planning question which confronts us here, it is not correct to say, as does the majority opinion, that BLM, by approving conveyance of Area 1, "complied with the provisions and intent of Departmental regulations," because there are no regulations directly applicable to the Area 1 situation. For reasons which are not explained except for the comment that the proposed definition relating to agency planning uses was "incomplete" or "unclear", the rule which could have had some application to this situation was not published with the rest of the regulation implementing ANCSA section 3(e). At most, therefore, it can be said that the Department made a decision not to proceed with formal rulemaking on that aspect of the statute. No other inference from the omission of the proposed rule can be drawn.

While the concurring Judge in FAA correctly pointed out that the existence of this gap in the regulation left to subsequent adjudication or later rulemaking the formulation of concepts for decisionmaking, he nonetheless found it possible to agree that the approach taken by the FAA majority opinion (followed by the majority here) was "a reasonable interpretation" of the statutory words "actual use." Id. at 398 (emphasis in original). This approach, however, simply avoids the question presented by this appeal, since it assumes that Congress may reasonably have intended to allow the conveyance of lands away from an agency despite the existence of pending projects, and despite the degree to which a given project had tended towards completion. Nothing in ANCSA supports such an approach.

Clearly, Congress did not intend that there be a conveyance into private ownership of lands which were devoted to a public purpose by a Federal agency. 43 U.S.C. § 1602(e) (1982). Had the hospital facility which now stands on Area 1 been completed on the date ANCSA became law, it clearly could not have been conveyed to BNC, because section 3(e) prohibits such transfers. If the hospital had been 50 percent complete on that date, would not the same result have been reached, even though the building was not then capable of use for a medical service function? And if construction for the ultimate Federal purpose sought for by the agency can be considered to be "actual use," as it seems it should be, then how far must that

construction activity have progressed before it can be said there is an "actual" or an "improved" use of the lands so as to bring section 3(e) into operation? The question to be answered ultimately by this appeal requires consideration of the particular facts presented by the agency claiming to be entitled to retain public lands. We must consider the circumstances of this case in order to determine whether there was an actual use, if we are to determine whether there exists a situation in which it must be found Congress intended to prevent conveyance of lands to a Native corporation.

It should be remembered that Congress did not prohibit the continuance of Federal planning on any of the lands in Alaska reserved for Federal purposes pending a determination whether conveyance of part or all of a reserve might be prohibited by section 3(e). Nothing prevented the Public Health Service in the case now before us from proceeding, as it did, in the prosecution of its plans to build a new hospital. While the enactment of ANCSA was undoubtedly a fact of which the hospital administrators were or should have been aware, therefore, the question before us becomes whether the project could reasonably have been stopped at the point when ANCSA became a relevant consideration, or whether, instead, section 3(e) protected the hospital's interest in the site of the new hospital. I conclude that continued planning was reasonable, in reliance upon the protection afforded to the Federal agency by section 3(e).

The facts concerning the construction of this facility are not in dispute. The public Health Service (PHS) began in 1967 to plan for either the repair or replacement of the Bethel hospital facility, which had deteriorated badly. By 1969, PHS had decided in favor of replacement rather than repair, staked out the hospital site, and performed an engineering study which culminated in an engineer's report on February 20, 1970. That report recommended construction of a replacement facility on the site which the hospital now occupies. Because the project required the use of Federal funds and involved construction upon tundra, extended initial planning was required. Funds for initial planning and soil tests were appropriated in 1971. Further funding for hospital construction planning was provided in 1974, and an environmental impact statement was prepared. On November 22, 1974, BNC filed its selection application which included the land in Area 1, the hospital site. In 1976, 1977, 1979, and 1980, more funding, including funding for staff housing was provided by Congress, and in September 1980 the new hospital began operations at the site where it is now located in Area 1.

Until the publication of the final rule promulgating 43 CFR Subpart 2655, the Department's position concerning the effect of agency planning use under section 3(e) appears to have been the view set out in correspondence between the Department's Solicitor and the Chairman of the House Indian Affairs Committee, which stated, pertinently, that:

> Actually used in the administration of a federal installation had been construed to mean that the federal agency must demonstrate a present need or use for the land as a part of the administration of the federal installation. The land need not

> be withdrawn or reserved for that particular purpose but may include lands appropriated for Federal use. (Emphasis supplied.)

(Letter dated Feb. 14, 1975, Solicitor Kent Frizzell to Chairman Lloyd Meeds). Thus, it was the early interpretation of ANCSA by the Department that some provision concerning the effect to be given to on-going planning activities was needed until rulemaking should be proposed. The majority and concurring opinions in our FAA decision, however, drew opposing conclusions from the failure of the Department to regulate the planning aspects of Federal activity on Federal lands in Alaska. Properly, however, the only conclusion properly to be drawn from the lack of rulemaking concerning the effect of pending planning actions is that decisionmaking should proceed by adjudication in this area. All that can realistically be said about this circumstance is that no formal rule on this subject was promulgated.

This is not a barrier to decisionmaking. It is not necessary that an administrative agency always employ rulemaking or that every possible subject area of a statutory responsibility delegated to an agency by Congress be implemented by rulemaking. S.E.C. v. Chenery Corp., 332 U.S. 194 (1947). As the Chenery Court observed:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other to exalt form over necessity.
>
> "In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgement into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards." [Emphasis added.]

Id. at 202-03. Cases coming before this Board which arise under ANCSA frequently present us with questions which require that we construe the statute unaided by prior Departmental rulemaking on the provision of law in issue. See, e.g., Mespelt & Almasy Mining Co., 99 IBLA 25 (1987); State of Alaska (Elliot Lind), 95 IBLA 346 (1987). The same is true generally of Board adjudication. See, e.g., Scott Burnham, 100 IBLA 94, 94 I.D. 429 (1987) (construing 30 U.S.C. § 29 (1982)); Celsius Energy Co., 99 IBLA 53, 94 I.D. 394 (1987) (construing 30 U.S.C. § 226(j) (1982).

An apparent reason for the Department's reluctance to issue a regulation defining the section 3(e) term "actual use" insofar as it relates to projects for land use which were not complete at the time ANCSA became law, is that such a rule would have been of doubtful utility. The comment in the Department's final rulemaking, quoted above, suggests this reason. But whatever the reason for the regulator's reticence, we cannot excuse ourselves from review of BLM decisionmaking simply because there is no Departmental regulation to illuminate some aspect of an appeal presented to us for review. In this case, there was a decision by BLM which is entitled to review before this Board. BLM found that conveyance of Area 1 was proper (although it did not rely upon our FAA opinion to do so), 1/ and found as a fact, that there was not actual use by PHS of the present hospital site in 1971. Underlying this finding, BLM held that

> [t]he concept of retaining land to meet" reasonable and prudent future needs" was dropped from the regulations because it did not meet the intent of the law. PHS has not established a 'construction process usage' of Area 1 prior to December 18, 1971. Rather, on December 18, 1971, Area 1 was a land asset which PHS considered available to meet its 'reasonable and prudent future needs.

(BLM Decision at 9).

This conclusion was erroneous for two reasons: first, it assumed a reason for the failure to regulate concerning planning usage which is unsupported by the rulemaking or the statute. As already explained, there is no legal basis for a conclusion that the planning function was not regulated because such use "did not meet the intent of the law." The second error in the conclusion stated by BLM arises from BLM's assumption that the "construction process usage" amounts to nothing more than land retention to meet reasonable and prudent future needs. The need for a hospital for Bethel became a present need in 1967, when it was recognized that the existing facility was failing to meet existing medical needs because of a deteriorated condition of the existing plant. The planning that began in 1967 was not for a future need which was not yet fully defined or articulated, but a plan designed to permit the continued performance of a present function, the furnishing of medical care by PHS to the Bethel area. How that function was to continue to be performed was determined when the decision was made in 1969 to build a new facility rather than to repair the existing structure. It was at that point that the "construction process usage" began, and not, as BLM found, when Area 1 was "designated as the official site" in May 1974.

The planning for the use of the Area 1 for a construction site was definite by 1969. Planning was continuous throughout the construction of the hospital, and was a necessary part of the construction, as it always is.

1/ There can be no argument here, therefore, that there has been a prior reliance upon our FAA opinion by anyone. It has yet to be applied, and consequently one of the principal arguments for the application of stare decisis in administrative adjudication is absent from this case.

Although a major change in planning occurred in 1969, there was no interruption of the planning process from its inception in 1967 until completion of the hospital in 1980. The planning involved in construction of the hospital had progressed from planning for a present need, to construction planning by 1971. It continued until completion of the hospital. Although the planning process was lengthy, it was necessarily made so by the nature of the construction site, the agency doing the planning, and the facility to be constructed. The planning process ultimately merged with the function performed by PHS at the hospital reserve: at no time has that purpose been abandoned. It continues today. I would therefore find that the planning in this case amounted to an actual use of Area 1 by PHS in 1971 within the meaning of ANCSA section 3(e).

There is another reason why we should not follow the FAA rationale in this case. Although FAA observes that, in defining "actual use," we must give meaning and effect to word of the statute construed, the decision in fact violates this principle. The statute does not limit the exclusion from conveyance to "any land actually used for any Federal installation." The operative clause actually says "land used in connection with the administration of any Federal installation." 43 U.S.C. § 1602(e). The analysis relied upon by the majority fails to give effect to this quoted language, because, as explained above, the planning of a multi-million dollar hospital is necessarily an element of the administration of that facility.

The majority opinion refuses to consider the various appropriations acts cited by PHS in support of the contention that such planning is a necessary part of the administration of this facility, and thus the clear meaning that those Acts of Congress must have are misinterpreted in this case. Such a construction of ANCSA section 3(e) is only possible by reading the word "administration" out of the statutory phrase "land used in connection with the administration of any Federal installation." Although the appropriations acts cited by PHS were enacted after passage of ANCSA they nonetheless ought to be considered, in this context, because they ratify PHS's administrative use of Area 1 which occurred prior to passage of ANCSA. Those acts therefore are of controlling significance, because they define the meaning of the word "administration" in the context which it must be understood when it appears in section 3(e) of ANCSA.

Obviously, the site where a functioning hospital is located is more desirable from the point of view of an acquiring Native corporation than is vacant tundra in the vicinity of the building. It is preferable to be landlord to PHS than to nesting ptarmigan. And were it not for ANCSA section 3(e) there would be no objection to making BNC the landlord for the new PHS hospital located on Area 1. But because the statute enjoins transfer to Native corporations of land actually used by Federal agencies for a Federal purpose in Alaska, the statute does not permit conveyance of Area 1 in this case.

By 1971 the project was common knowledge in the community. The declared purpose of PHS, made evident by prosecution of requests for funding, engineering studies, and the mobilization of general support for the construction plan, was to build a new hospital on the site of Area 1.

By the time BNC selected Area 1 for conveyance to the corporation under ANCSA, planning for the new facility had been under way for 7 years and had produced visible results. To have stopped the project at any time after 1971 would have frustrated more than contingency planning for future needs, it would have interrupted an on-going project designed to meet present demands.

I would therefore overrule FAA to the extent that opinion would be inconsistent with disapproval of BNC's selection of the land in Area 1, and find that construction planning in this case had progressed to a point, in 1971, where it amounted to actual use of that land within the meaning of section 3(e). The weakness of the opposite result, reached by the majority, is emphasized by the fact that they refuse to allow conveyance of Area 4 where the Chevron-owned oil tanks are located because those tanks are used to supply heating fuel to the hospital. This produces the ludicrous conclusion that PHS may retain in public ownership land used to maintain the heating supply to a public hospital which is located on private land. Thus, the continuing purpose of the hospital to supply medical services to the community is recognized for the auxiliary purpose of heating the facility, but not for the main purpose for which the facility exits. 2/

Not only is this result ridiculous, it is a violation of ANCSA, for it permits the transfer of Federal lands actually used for a Federal purpose to a Native corporation. Accordingly, I am obliged to dissent from the majority holding pertaining to Area 1.

Franklin D. Arness
Administrative Judge

2/ It should be noted that, as the concurring opinion in FAA observed, Secretarial intervention remains a possibility in this case pursuant to 43 CFR 2655.4(a) despite the result reached by a majority of this Board.